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Mr. Thomas M. Dorman  
Kentucky Public Service Commission  
211 Sower Boulevard  
P.O. Box 615  
Frankfort, Kentucky 40601

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JUN 11 2003

PUBLIC SERVICE  
COMMISSION

**RE: Case No., 2002-456, Inquiry into use of Contract  
Service Arrangements by Telecommunications  
Carriers**

Dear Mr. Dorman:

Enclosed please find the original and ten copies of NuVox Communications, Inc. and Time Warner Telecom's Opposition to Cincinnati Bell's Motion to Compel. Please indicate receipt of this filing by your office by placing a file stamp on the extra copy and returning to me via the enclosed, self-addressed, stamped envelope.

Sincerely Yours,

Douglas F. Brent  
Counsel to NuVox Communications, Inc. and  
Time Warner Telecom

DFB:jms

Enc.

Cc: Parties of Record

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

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JUN 11 2003

PUBLIC SERVICE  
COMMISSION

In the Matter of

INQUIRY INTO THE USE OF )  
CONTRACT SERVICE ARRANGEMENTS )  
BY TELECOMMUNICATIONS ) CASE NO. 2002-00456  
CARRIERS IN KENTUCKY )

OPPOSITION TO CINCINNATI BELL'S MOTION TO COMPEL

NuVox Communications, Inc. ("NuVox") and Time Warner Telecom ("TWT") (collectively, "Respondents"), by counsel, hereby respond<sup>1</sup> to and oppose Cincinnati Bell Telephone Company's ("CBT") motion to compel responses to CBT's data requests. Respondents also oppose CBT's "alternative" application for subpoenas requiring document production and appearances at the June 17 hearing. As shown below, there are four reasons the motion must be denied. First, CBT cannot compel responses from non-parties. Second, as initial non-parties who elected not to intervene, NuVox and TWT have not been served with pleadings and responses of other parties, including those of CBT. Forcing NuVox and TWT to "join" nearly seven months into the case and less than a week before

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<sup>1</sup> In filing this opposition to CBT's motion to compel and alternative application for subpoena Respondents' appearance is not a waiver of any argument that they are non-parties not subject to any obligation to participate in this case.

a formal hearing would be fundamentally unfair and would deny them an opportunity to meaningfully participate. Third, CBT's application and motion are not timely. Finally, CBT's own self-contradictory positions regarding the obligation to participate in this proceeding should estop CBT from bringing a motion to compel against Respondents or any other putative "party" to this case.

**I. CONTRARY TO CBT'S CLAIM, RESPONDENTS ARE NON-PARTIES AND ARE NOT REQUIRED TO ANSWER CBT'S REQUESTS.**

This rulemaking has its origin in two complaint cases involving allegations that BellSouth engaged in unlawful price discrimination, to the detriment of customers who lacked bargaining power (i.e. a competitive offer for similar service).<sup>2</sup> In opening the instant case last year the Commission expressed concern that perhaps it had gone too far in granting certain regulatory flexibility to BellSouth and to other ILECs.<sup>3</sup>

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<sup>2</sup>Case No. 2001-00099, *SPIS.net v. BellSouth Telecommunications, Inc.*; Case No. 2001-00068, *Computer Innovations v. BellSouth Telecommunications, Inc.* In *SPIS.net* the Commission stated its concern this way: "Our previous decisions, in which we have relaxed our regulatory authority with the intention of ensuring that Kentucky's ILECs are not unfairly disadvantaged by competition, may bear reconsideration." Order at p. 9 (December 19, 2002).

<sup>3</sup>"It is perhaps inevitable that we now find it necessary to determine whether some of our decisions relaxing the regulatory regime pursuant to KRS 278.512 may inadvertently have created problems." Case No. 2002-00456, December 19, 2002 Order at p. 2. The specific examples of prior decisions contained in the December order all relate to conduct and practices at BellSouth.

Inviting the industry to comment on the situation, the Commission named all ILECs and various competitive carriers as respondents. The list of respondents was identified as Appendix A to the initial order. The PSC provided an opportunity for respondent carriers to opt-out of participating in the proceeding, and many carriers, including some ILECs, have availed themselves of the opportunity. But the most salient aspect of the December 2002 order insofar as it pertains to CBT's current motions is the fact that the Commission deliberately excluded NuVox, TWT and several other carriers from its list of respondents. The order stated non-respondents could request to participate by sending a letter to the Commission. However, neither NuVox nor TWT elected to participate. NuVox and TWT are not parties to the case.

**II. NUVOX AND TWT HAVE BEEN TREATED AS NON-PARTIES BY CBT AND OTHER PARTIES AND HAVE NOT BEEN SERVED WITH FILINGS.**

In its data request attached to the June 5 motion, CBT concedes that NuVox and TWT were not on the Commission's original service list. Nevertheless, CBT states that NuVox and TWT are parties "based on the original Order commencing this proceeding." Data Request at p. 2. CBT is mistaken. CBT's misreading of the PSC's order eviscerates the distinction the Commission drew between carriers on Appendix A, who were permitted to opt out, and carriers excluded from

Appendix A, who were invited to opt in. The consequences of the choice to manage the proceeding this way are certainly clear in retrospect. Carriers not on Appendix A (including NuVox and TWT) who took no affirmative action to join the case were never added to the service list. (NuVox and TWT are not even on the revised service list currently posted on the Commission's website.)

Not surprisingly, CBT relied on the initial service list. Consequently, it has never served its own responses to the Commission's data requests upon NuVox or TWT. Undeniably, the service list attached to CBT's June 6 motion does not include NuVox or TWT.<sup>4</sup> This tends to illustrate the peculiar and problematic nature of CBT's motion - CBT is asking the Commission to compel production from entities CBT has not even bothered to serve with its own filings in the case.

**III. CBT'S APPLICATION AND MOTION ARE NOT TIMELY.**

If CBT believed the Commission had erred in identifying proper parties and structuring the proceeding, CBT could have sought clarification or rehearing at the outset. The Commission would have responded, as it did when BellSouth

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<sup>4</sup>Counsel for CBT served the application for subpoena and motion to compel on local counsel for NuVox, and faxed the motion to in-house counsel for TWT. However, the absence of NuVox and TWT from CBT's own service list contradicts CBT's claim that all carriers are parties. Surely, CBT would not argue that a utility that had never been served with CBT's own filings in the case should be held to answer to a motion to compel.

filed a timely request for reconsideration, asking that it be permitted to file only samples of its CSAs. The Commission granted BellSouth's request, then ordered all parties to submit responses to data requests in CD-ROM format.<sup>5</sup> The order granting rehearing also reiterated that *parties* to the case had been identified by Appendix A of the December 19, 2002 order.<sup>6</sup> Thus, if it had not been clear earlier, it was clear in January that NuVox and TWT were not on the service list and were not parties to the case.

If CBT believed NuVox and TWT were indispensable parties it could have asked the Commission to enlarge the proceeding after the second order -- five months ago. Instead, CBT waited until April, when it sent data requests to non-parties. After CBT propounded these data requests to NuVox and TWT, both carriers sent timely responses to counsel for CBT, explaining that as non-parties to the case they would not be responding to data requests or otherwise participating in the case. With more than six weeks remaining before hearing, this would have been a proper time for CBT to contact Respondents to try to seek resolution. The Commission has advised that disputes regarding discovery matters should be resolved informally whenever possible, prior to filing a *timely* motion

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<sup>5</sup>Case No. 2002-00456, January 28, 2003 Order at p. 2.

<sup>6</sup>Id. at p. 4.

to compel.<sup>7</sup> Instead, CBT waited nearly six weeks before filing its application for subpoena. Then, before respondents even had a chance to reply, CBT changed course and brought the instant motion to compel. CBT's motion is not timely.

**IV. PRIOR TO SEEKING DISCOVERY FROM ITS LOCAL AND LONG DISTANCE COMPETITORS AND FILING ITS MOTION TO COMPEL, CBT MADE CERTAIN ITS OWN COMPETITIVE AFFILIATE WOULD NOT BE REQUIRED TO PARTICIPATE IN THE CASE.**

In its motion to compel, CBT suggests it is somehow unreasonable and perhaps unexpected that its competitors have declined to respond to CBT's discovery requests. CBT suggests its competitors have somehow misunderstood their obligation to obey CBT's requests, e.g., "in essence, the parties have taken the position that they are not parties to the case and/or are not intending to participate in the proceeding." CBT Motion to Compel at p. 1. Attached to CBT's motion are letters from counsel for NuVox, TWT and other carriers "asserting the basis for their refusal to answer." CBT's motion seeks to convince the Commission that respondents were obliged to answer CBT's questions and that these letters were inappropriate responses to CBT.

Respondents are struck by the irony of CBT's argument. After all, on March 21, 2003, twelve days before mailing its

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<sup>7</sup> See Case No. 96-524-A, *Examination by the Public Service Commission of the Application of the Fuel Adjustment Clause of Louisville Gas and Electric Co.*, (May 17, 1999) at 4 (citation omitted).

data requests to NuVox and TWT, counsel for CBT, who also represents CBT affiliate Broadwing Telecommunications, Inc. ("Broadwing"), wrote to the Commission and explained that Broadwing "wishes to be relieved of any obligation to provide written responses to any requests for information presented by the Commission or other parties, to provide testimony, or to otherwise participate in the proceeding. (emphasis added.) The March 21 letter, written on Cincinnati Bell letterhead, is attached as Exhibit A. Broadwing is a competitor of NuVox and TWT, and apparently provides services that CBT bundles with local service and sells to its own customers.

The prior request on behalf of its affiliate did not dissuade CBT from sending data requests to its affiliate's competitors. Nor did it deter CBT from mounting its eleventh hour attempt to pressure the Commission into enlarging the scope of the proceeding by forcing non-parties who compete with Broadwing to spend resources on a proceeding that Broadwing believed was not worth the trouble.

Having taken steps to encapsulate its own competitive affiliate from the inquiries of the Commission and other parties, CBT now seeks to turn the PSC's December 19 Order from shield to sword, by suggesting that all carriers in Kentucky are parties and must respond to CBT data requests. This blatant self-contradiction places CBT's late stage

maneuver in a whole new light. CBT's motion should be dismissed.

**V. IF THE PSC GRANTS CBT'S REQUESTS IT MUST REISSUE NOTICE, IDENTIFY PARTIES AND PROVIDE A NEW PROCEDURAL SCHEDULE.**

Respondents understand that this proceeding is significant and important, and that the Commission has hoped for participation from a variety of industry participants. But the significance of the proceeding is not the issue before the Commission. Nor is the relevance of the information sought by CBT - much of which is publicly available. Rather, the question is whether a party to a proceeding may compel participation and obtain discovery from non-parties in a case where participation was optional. Should the PSC determine to grant this extraordinary relief to CBT, it must also cancel the June 17 hearing, reissue notice of the proceeding with more specific guidance as to the issues and indispensable parties, and issue a new procedural schedule.

**VI. CONCLUSION.**

For the reasons discussed herein CBT's motion and application should be denied.

Respectfully submitted,



Carol Keith  
Director of Regulatory  
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NuVox Communications, Inc.  
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C. Kent Hatfield  
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Pamela H. Sherwood  
Vice President of  
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Time Warner Telecom  
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Indianapolis, IN 46268

CERTIFICATE OF SERVICE

A copy of the foregoing was served this 10<sup>th</sup> day of June, 2003 first class, United States mail, postage prepaid, upon those persons listed on the attached service list.

A handwritten signature in black ink, appearing to be 'LRA', is written above a horizontal line.

SERVICE LIST - PSC 2002-00456

Sylvia Anderson  
AT&T Communications of the South Central  
South Central States  
1200 Peachtree Street, N.E.  
Suite 8100  
Atlanta, GA 30309

Scott Beer  
ICG Telecom Group, Inc.  
161 Inverness Drive West  
Englewood, CO 80012

Kennard Woods  
MCIMetro Access Transmission Services,  
Inc.  
6 Concourse Parkway, Suite 3200  
Alpharetta, GA 30328

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Hon. Ann Louise Chevront  
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Utility & Rate Intervention Division  
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Mountain Telephone Cooperative, Inc.  
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West Liberty, KY 41472-0399

Stephen R. Byars  
ALLTEL Kentucky, Inc.  
P. O. Box 1650  
Lexington, KY 40588-1650

James Campbell  
Gearheart Communications Co.  
*dibla* Coalfields Telephone Co.  
5 Laynesville Road  
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Georgetown, KY 40324

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9500 Communications Lane  
P. O. Box 789  
Hindman, KY 41822

Hon. William R. Atkinson  
Sprint Communications Co.  
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Mailstop GAATLDO602  
Atlanta, GA 30339

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Cincinnati, Ohio 45201-2301

March 21, 2003

Mr. Thomas M. Dorman  
Executive Director  
Kentucky Public Service Commission  
211 Sower Boulevard  
P.O. Box 615  
Frankfort, Kentucky 40602

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MAR 24 2003

PUBLIC SERVICE  
COMMISSION

RE: Inquiry Into the Use of Contract Service Arrangements by Telecommunications Carriers in Kentucky—Case No. 2002-00456

Dear Mr. Dorman:

By Order dated December 19, 2002, the Commission initiated this proceeding for the purpose of investigating the practices and policies of Kentucky's telecommunications carriers with respect to contract service arrangements ("CSAs"). The Commission ordered each telecommunications carrier listed in the appended service list to respond to certain information requests or, in the alternative, to inform the Commission that it did not want to participate in the proceeding. By Order dated January 28, 2003, the Commission expanded the scope of its inquiry to include all carriers providing long-distance service or local service in Kentucky.

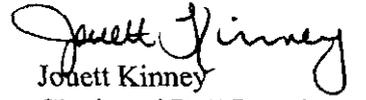
Cincinnati Bell Long Distance Company ("CBLD") was among those companies directed to respond to the information requests or state why it would not be participating in the proceeding. As requested by the Commission, CBLD hereby informs the Commission that it does not wish to participate. CBLD has not provided either local or long distance services in Kentucky since 2001 and is no longer certified to provide service in Kentucky.

Broadwing Telecommunications, Inc. ("BRW") provides long distance service in Kentucky. BRW also wishes to inform the Commission that it does not wish to participate in this proceeding. BRW is currently in the process of reorganizing its business operations as a result of a pending sale of its assets. For this reason, BRW wishes to be relieved of any obligation to provide written responses to any requests for information presented by the Commission or other parties, to provide testimony, or to otherwise participate in the proceeding.

Mr. Thomas M. Dorman  
March 21, 2003  
Page 2

A duplicate original copy of this letter is enclosed; please date-stamp this copy as acknowledgement of its receipt and return it in the enclosed, self-addressed envelope. Questions regarding this filing may be directed to me at the above address or by telephone at (513) 397-7260.

Sincerely,

  
Jollett Kinney  
Cincinnati Bell Telephone

cc: Parties of Record